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IN THE

Supreme Court of the United States

October Term, 1963

No. 246

S. ROBERT TRALINS, for himself and
"PLEASURE WAS MY BUSINESS"
as a book,

Petitioner,

vs.

RICHARD E. GERSTEIN, as State Attorney,

Respondent.

PETITIONER'S REPLY BRIEF

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ARGUMENT

This Court Has Jurisdiction In the Instant Case as The Florida District Court of Appeal, which Properly Assumed Jurisdiction Below, Is the Highest State Court in which a Decision May Be Had.

Respondent's Brief,[1] pp. 2-4, apparently challenges petitioner's appeal to the Florida District Court of Appeal—a rather unusual time for raising such issue, and

[1]The following symbols will be used: "P" for Petition for a Writ of Certiorari . . . "PA" for Appendix attached to Petition, "R" for Respondent's Brief, and "RA" for Respondent's Appendix.

a novel attempt to deprive this Court of jurisdiction herein.

Suffice to say that the Supreme Court of Florida has no jurisdiction to hear a direct appeal herein from the trial court under Art. V, sec. 4(2) of the Fla. Const. since the trial court did *not* directly pass upon the validity of a state statute nor construe any controlling provision of the state or Federal Constitution.

"*Applying* the test laid down by our Appellate Courts and by the Florida Statutes," i.e., the test set forth in *Roth* v. *United States*, 347 US 476, 77 S. Ct. 1304, 1 L Ed. 2d. 1498, and Fla. Stats. sec. 847.011, Laws of Florida, 1961, Ch. 61-7, sec. 10, the trial court found "Pleasure Was My Business" obscene (A. 8, emphasis added). Indeed the Florida District Court of Appeal specifically quoted in its opinion the trial court's language set forth above, noting that the statutory test applied was based on the *Roth* case and had been upheld in Florida previously in *Rachleff* v. *Mahon*, Fla. 1960, 124 So. 2d. 878, inter alia. (P.A. 12-13).

The entire tenor of both courts' opinions demonstrates their awareness that the only question involved was the *application* of the statutory obscenity test to the book in question. The appellate court concluded its opinion as follows:

> " . . . the trier of fact, in this instance the trial court, examining the evidence as whole, *applied* the proper test and concluded that the the subject book was obscene. There is nothing

in this record that would cause us to disagree with its conclusion." (P.A. 14)

In the pending "Florida Tropic-of-Cancer" Case, the trial court held the book obscene and banned it, after which appellant appealed to the same Florida District Court involved in the instant case. Appellant originally *attacked the validity and constitutionality* of the Florida obscenity statute but later withdrew such ground of appeal, challenging only the *application* of the statute to the book. The Florida District Court on its own motion transferred the appeal to the Supreme Court of Florida *Grove Press Inc.* v. *Gerstein* (Fla. App. 1963) 152 So. 2d 177. The Florida Supreme Court held that it had *no* jurisdiction and returned the case to the appellate court. *Grove Press, Inc.* v. *State of Florida ex rel Richard E. Gerstein*, Fla. May 31, 1963, ____So. 2d.____.[2]

Since no direct appeal from the trial court to the Florida Supreme Court was permissible, the appellate court properly rendered its decision under Art. V. sec. 5(3) of the Florida Constitution.

Nor could petitioner have appealed to the Florida Supreme Court *after* the appellate court's affirmance of judgment below as said court's appellate jurisdiction is "in substantial measure *final*", *Karlin* v. *City of Miami Beach*, Fla. 1959, 113 So. 2d 551, 552 (emphasis added), and prevails except where the Fla. Supreme Court has appellate or certiorari review power, 5 Fla. Jur., *Certiorari*, sec. 6.1 in 1962 Supp. p. 42.

[2]The Florida District Court of Appeal heard oral argument in the Tropic-of-Cancer case on July 11, 1963 and has not as yet rendered any decision therein.

The exception is not applicable herein as the appellate court did not intitally pass upon the validity of a state statute, initially construe any controlling constitutional provision (appeal grounds), nor render a decision affecting state officers, involving a certified question, or conflicting with other appellate decisions (certiorari grounds), Art. V, sec. 4(2) of the Fla. Const. It should be noted that "construction" of a controlling constitutional provision requires explaining or defining rather than merely applying said provision. *Armstrong* v. *City of Tampa*, Fla. 1958, 106 So. 2d. 407, 409.

Petitioner submits that the Florida Supreme Court now has *no* common-law power of certiorari apart from the constitutional bases discussed above, *Robinson* v. *State of Florida*, Fla. 1961, 132 So. 2d. 3, 5; *Karlin* v. *City of Miami Beach*, Fla. 1959, 113 So. 2d. 551, 552, 5 Fla. Jur., *Certiorari*, sec. 6.1 in 1962 Supp. pp. 42-44; but the continued existence of such a power is irrelevant since it never provided a *full review* of the case involved, was *limited* to determining whether or not the lower court exceeded its jurisdiction or proceeded contrary to essential legal requirements (a determination *not* sought by petitioner now or before in this case), and therefore cannot deprive this Court of jurisdiction. *Dresner* v. *City of Tallahassee*, cert. granted, — U.S. —, — S. Ct. —, — L Ed. 2d. —, 31 LW 3338.

As neither the trial court nor the appellate court ever (1) passed upon the validity of the Florida obscenity statute or (2) construed any controlling constitutional provision, petitioner was unable to have the Florida Supreme Court review the case at bar by direct appeal, indirect appeal, or certiorari. The Florida District Court

of Appeal properly assumed jurisdiction and the decision rendered by said court is the *ultimate* decision available to petitioner in the courts of Florida.

CONCLUSION

For the foregoing reasons, Petitioner submits that this Court has jurisdiction of the instant case under 28 USC sec. 1257 as the Florida District Court of Appeal is the highest state court capable of rendering a decision herein, which decision involves a deprivation of federal constitutional rights and should be reviewed by this court by a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, RICHARD YALE FEDER, Counsel for Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on_____, 1963, I served copies of the foregoing Petition for Writ of Certorari on the Respondent and on cross-appellant below by mailing a copy thereof in a duly addressed envelope with postage prepaid to each of following, to wit, GLENN C. MINCER, Assistant State Attorney, State Attorney's Office, Dade County Courthouse, Miami, Florida, and on N. JOSEPH DURANT, JR., Assistant State Attorney, State Attorney's Office. Dade County Courthouse, Miami, Florida, and to HONORABLE RICHARD W. ERVIN, Attorney-General of Florida, Tallahassee, Florida (air mail postage prepaid), and to HERBERT P. BENN AND LEONARD R. MELLON, Assistant Attorneys General, Miami, Florida, attorneys for Respondent, and JOSEPH P. DURANT, Seybold Building, Miami 32, Florida; and to DANIEL L. GINSBERG, 566 N. E. 15th Street, Miami, Florida, attorney for cross-appellant below.

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